taken—had passed through the hands of various successors of the original company, into the possession of the defendant company. Sundry promises of payment had been made by the officials of some one or more of the companies, but by what companies and how long before suit brought does not appear. The road had been sold in a creditors' suit, to which the plaintiff, however, was not a party, but of the pendency of which he had knowledge. He does not appear to have given the purchaser any notice of his claim, so that the purchaser might have protected itself out of the purchase money or otherwise. As a general rule, one who knowingly permits another to buy and pay for property, title to which he knows is in himself, will be equitably estopped afterwards to assert his claim. The estoppel will not operate (in Virginia) to transfer legal title, but a court of equity will, in a proper case, compel a conveyance of the legal title as an accompaniment of the estoppel—and the case here was in equity. It is probable, however, that the estoppel was obviated by the subsequent promises of the purchasing company. We say probable, because, as already stated, when and by what companies these promises were made, is not disclosed by the opinion. We are disposed to dwell somewhat particularly upon the point of estoppel, because of the danger that this case will hereafter be quoted as authority for greater laxity on the part of a lienor in asserting his rights against *bona fide* purchasers than the court would consciously sanction, or sound principles warrant.

RICHMOND PASSENGER & POWER COMPANY v. STEGER.*

Supreme Court of Appeals: At Richmond.

March 12, 1903.

1. NEGLIGENCE—*Street railways—Person on track—Contributory negligence—Instructions.* There being evidence tending to show that a plaintiff, after going upon a street railway tract, did not use ordinary care in getting off before he was struck by an approaching car which was very near and which he had signalled to stop, it was error to instruct the jury to find in his favor if they believed from the evidence that at the time he got on the tract, "the motorman of the car saw, or could, by the exercise of ordinary care, have seen him in time to stop the car so as to avoid striking him, and failed, in the exercise of such care, to do so."
2. INSTRUCTIONS—*Effect of inconsistency.* Where instructions are inconsistent with, or contradict each other, it is impossible to say by which the jury was controlled, and the verdict should be set aside.
3. VERDICTS—*Erroneous instruction—When harmless.* This court will not set aside the verdict of a jury, although erroneous instructions have been given, if the record clearly shows that, upon proper instructions, the jury could not have properly found any other verdict. But this rule has no application when the evidence on the material questions involved is so conflicting that if the verdict had been for the opposite party the court could not have disturbed it.

Error to a judgment of the Law and Equity Court of the city of

*Reported by M. P. Burks, State Reporter.

Richmond, rendered March 26, 1902, in an action of trespass on the case, wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant. *Reversed.*

The opinion states the case.

Henry Taylor, Jr., for the plaintiff in error.

Wyndham R. Meredith and *B. O. James,* for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

R. H. Steger instituted his action of trespass on the case to recover damages for injuries done him by the Richmond Passenger and Power Company, a corporation operating a street car line in the city of Richmond. The plaintiff's injuries were caused, it is alleged, by the negligent running of one of the defendant's cars upon him whilst crossing its track at the intersection of Third and Broad streets in that city. The trial of the cause resulted in a verdict and judgment for the plaintiff. To that judgment this writ of error was awarded.

Two errors are assigned—one to the action of the court in giving instruction "F" offered by the plaintiff, and the other to the refusal of the court to set aside the verdict.

The instruction complained of is as follows: "If the jury believe from the evidence that at the time Mr. Steger got on the south track of defendant company while crossing Broad street at Third street the motorman of car No. 7 saw, or could by the exercise of ordinary care have seen, him in time to stop the car so as to avoid striking him, and he failed in the exercise of such care to do so, they are instructed they must find for the plaintiff."

The objection made to the instruction is that, since it concludes with the direction to find for the plaintiff, it must therefore contain within itself every fact necessary for that conclusion, and yet it nowhere provides that the plaintiff must be free from contributory negligence.

The instruction assumes that the plaintiff was guilty of contributory negligence in going upon the street railway track at the time that he did, and then tells the jury that notwithstanding such negligence he might recover, if they believed that the defendant saw, or could by the exercise of ordinary care have seen, the plain-

tiff in time to stop its car so as to avoid injuring him, and failed to do so. This was a correct statement of the law upon that assumption, unless there was evidence tending to show that the plaintiff, after he went upon the track, did not exercise ordinary care in getting off the track before the car reached him. There is evidence tending to show that the plaintiff, after he went upon the track, paid no further attention to the approaching car. If he had done so, the defendant's counsel insists, he would have seen that the car was not checking its speed nor going to stop, as he had motioned it to do, and when he saw this he might by his own movements have gotten out of the way of the car and saved himself from injury.

The trial court recognizing that there was such evidence, upon motion of the defendant gave instruction No. 6 to the jury. By that instruction the jury were told in effect that although they might believe that the defendant did not exercise due care in the management of its car after it saw the plaintiff upon the track, yet they must find for the defendant if they believed that the plaintiff, in the exercise of reasonable care by watching the approaching car and hastening across, could have crossed the track before the car reached him, and failed to do so.

Instruction F is therefore erroneous in the respect complained of, and that error is not cured by instruction No. 6, in which there is a correct statement of the law upon that question. Where two instructions are inconsistent with or contradict each other, it is impossible to say whether the jury were controlled by the one or the other. *Va. etc. Wheel. Co.* v. *Chalkley,* 98 Va. 62, 66; *N. & W. Rwy. Co.* v. *Mann,* 99 Va. 180, 187; Sackett on Instructions (2d ed.), 25; Blashfield on Instructions, secs. 73 and 74.

The counsel of the plaintiff insist that, although the court be of opinion that instruction "F" was erroneous, the judgment should not be reversed on that account, because upon the whole case it is clear that no other verdict could have been properly found.

It is the well settled rule of this court to uphold a verdict notwithstanding the jury have been erroneously instructed, if the record shows clearly that upon correct instructions the jury could not have properly found any other verdict. *Richmond Rwy. Co.* v. *Garthright,* 92 Va. 48, 51; *Wright* v. *Independence Bank,* 96 Va. 728, 732.

But this rule has no application in a case like this, where the

evidence on the material questions involved is so conflicting that if the verdict had been in favor of the defendant the court could not have disturbed it.

The evidence of the defendant, if true, showed that it was not running its car at a greater rate of speed than it had the right to run it; that the car was properly equipped and in charge of a competent motorman; that proper warnings of its approach to the crossing were given; that the car was within eight to fifteen feet of the plaintiff, who knew of its approach, when he stepped on the track, and that the brakes were applied at once; and that running at it was, from six to eight miles an hour, the car could not be stopped under twenty-five feet.

With such evidence in the case, we cannot say that no other verdict than that which was rendered could have been properly found by the jury.

Having reached the conclusion that the giving of instruction "F" was error for which the judgment complained of must be reversed, it is unnecessary to consider the other assignment of error as to the sufficiency of the evidence to sustain the verdict.

The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion. *Reversed.*

NOTE.—This case appears to have been decided on sound and familiar principles.

The rule stated in the opinion that although the jury may have been erroneously instructed, yet, if the record shows that upon correct instructions the jury could not properly have found any other verdict, the error will be treated as harmless, and the verdict be permitted to stand, is a well settled rule of practice in this State, and is founded upon soundest reason. If the jury, notwithstanding the error of the trial court, have found a righteous verdict, and the only verdict warranted by the law and the evidence, every principle of justice and good sense demands that the harmless error be disregarded.

But the court has uniformly declined to apply the same sound reasoning to the case where the trial court has refused an instruction on evidence insufficient to sustain a verdict. If, for example, the evidence for the plaintiff is insufficient to sustain a verdict in his favor, certainly nobody will deny that the defendant is entitled to the verdict. Should the jury find for the plaintiff, justice will miscarry, unless the trial court sets the verdict aside. Under the evidence, it is the sworn duty of the jury to find for the defendant. Should the court, therefore, refuse an instruction correctly interpreting the law from the plaintiff's standpoint, and should the jury do its duty in finding a verdict for the defendant—the only permissible verdict under the law and the evidence—no possible harm results to

the plaintiff. If it was error to refuse such instruction (as the Virginia Court of Appeals uniformly holds it to be) it was certainly harmless error—since *ex hypothese*, the record shows that no other verdict could have been sustained.

If the question were now presented for the first time, it would be plain enough that instead of the trial court's having committed error, in refusing the instruction, its action was clearly right. It merely refused to mislead the jury into an erroneous verdict, and one that the court could not sanction under the evidence. Yet, curiously enough, the same appellate court that formulated and applies the sensible rule of the principal case, that a righteous verdict will not be disturbed for an erroneous but harmless instruction *given*, also formulated and applies the other rule that an instruction *refused*, because likely to mislead the jury (and therefore its omission is not only harmless but demanded in the interest of justice) is not only *error*, but *harmful* error. In other words, the latter rule compels the trial court, under the penalty of a reversal, to invite the jury into finding a verdict which the law and the evidence do not sanction, and one which, if the trial court does not set it aside, the appellate court will. Under this rule, the party who went into the trial without sufficient evidence to sustain the issue on his part, and who, under all civilized systems of jurisprudence, should suffer an adverse verdict, gets a new trial, not because injustice has been done him, but because the trial court refused to deceive the jury in his favor. The result is, that the adverse party, who recovered the verdict—a verdict fully sustained by the law and the evidence—is deprived of his just rights, and further litigation is made necessary, to the manifest injury of both the public and the individual.

We have heretofore animadverted upon this rule. (7 Virginia Law Register, 578). It is peculiar to Virginia, and possibly one or two other States. It formerly prevailed in West Virginia, but since attention was called to the inconsistency and injustice of it through these columns—notably in an article by W. Gordon Mathews, Esq., of the Charleston (W. Va.), bar (7 Virginia Law Reg. 521)—the West Virginia Court has repudiated the rule. See *White* v. *L. Hoster Brewing Co.*, 41 S. E. 180, 8 Virginia Law Reg. 293. The logical result of the repudiation of the rule (a result accepted by the West Virginia court) is, that where the evidence plainly will not support a verdict for one of the parties, the court may give a peremptory instruction to the jury to find for the adversary. In such case, it may, theoretically, be error to give a peremptory instruction, but if this results in the jury finding the only verdict possible under the evidence, it is harmless error. But, as said by the West Virginia court, if, because the error is harmless it is not improper, it is a contradiction of terms to term it error. "To say you are entitled to a trial by a jury, and yet because the jury should have found against you, you were deprived of it erroneously, and yet rightfully, because [the error was] harmless, is a contradiction within itself." The same court, in the case cited, said further on this subject: "The question is now presented whether this court should follow the development of the law slowly crystallizing around the majority rule, sustained as it is by reason and justice, or still cling to the antiquated theories of the minority rule, for fear of invading the province of the jury. Shall the circuit court, in a plain case, be compelled to sit still, and permit" [and in Virginia encourage by an instruction] "a jury to bring in a verdict contrary to the plain and decided preponderance of the evidence, and then set it aside and be compelled to repeat the farce of a trial? . . . It would be folly on the

part of this court to reverse a case and remand it for a new trial where, if the jury should find against its former verdict, though directed by the lower court, it would be the duty of this court to set aside such verdict as contrary to the plain preponderance of the evidence. This would be administering to litigiousness rather than justice."

The Virginia rule in question was not established by the present judges of the court. It grew up gradually, and, like many other rules, has probably been allowed to stand because its inconsistency and its evil effects were never distinctly apprehended by the judges who enforce it. There is no reason why the court should not now, of its own motion, abrogate it. The rule of *stare decisis* does not interfere with mere rules of practice. The court has full power to make its own rules, save where they would conflict with constitutional or statutory provisions. All the rules of practice in the appellate court (save a few prescribed by statute) were made by the court itself, and these it has from time to time altered as justice and convenience demanded.

A striking example of an absurd rule, prevailing for many years in our appellate court, and finally repudiated when the court saw the absurd consequences, was the practice of reversing a case where the bill of exceptions was so ambiguous that the appellate court could not determine what the action of the lower court was. That is to say, unless the appellate court could see that the action of the lower court was *right*, it would presume that it was *wrong*. This is stated as the existing law in 4 Minor's Inst. (3d. ed.) 1082, though it has long since been abandoned. It seems first to have been questioned in *McDowell* v. *Crawford*, 11 Gratt. 373, where Lee, J., held the rule unsound, while Moncure, J., vigorously defended it as well settled by numerous previous cases cited. No rule is now better settled than that the judgment of the lower court is presumed to be right, and the burden is on the appellant to show the contrary by the record. And if the record does not clearly show error, the decision must be affirmed. The old rule set a premium upon obscure or otherwise badly drawn bills of exceptions. The rule we have been criticizing is not a whit less behind this in its evil consequences. *Malus usus abolendus.*

COUNCIL OF TOWN OF FARMVILLE V. WALKER.*

Supreme Court of Appeals: At Richmond.

March 12, 1903.

1. CONSTITUTIONAL LAW—*Sale of intoxicating liquor—Dispensary—Municipal corporations.* The regulation of the sale of intoxicating liquor is within the police power of the State, and it may authorize a municipal corporation to establish a dispensary for the sale of such liquor, though in doing so it may render necessary the expenditure of money and ultimately the imposition of a tax. The object is a public one, in the promotion of which public money

* Reported by M. P. Burks, State Reporter.